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# Official, Operative and Outsider Justice: The Ties That (May Not) Bind<sup>1</sup> in Family Financial Disputes

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## Keywords

Family Justice – Financial Remedies – Settlement – Private Ordering

## Summary

Settlement between individuals on relationship breakdown has received increasing attention in recent years with the promotion of autonomy and private ordering underlining this trend. In exploring this development, this article will suggest that the conception of justice on family separation varies depending on the nature of the dispute and the route to settlement. A paradigm of justice can be identified with three conceptual spaces starting to emerge: *official*, *operative* and *outsider* justice. Drawing on this framework, this article will argue that most individuals' experience of family disputes is via *outsider* justice – where family law and legal rules may have little impact on the outcome of disputes and family law may become a simplified version of its former self. This article will draw on the author's various empirical studies to examine how specific discourse on private ordering and settlement shapes this justice paradigm in family finances.

## Introduction

Settlement between individuals on relationship breakdown has acquired the status of a new practice norm in family justice. This in itself is uncontroversial. Recent policy,<sup>3</sup> consultation and review documents,<sup>4</sup> as well as academic commentary<sup>5</sup> highlight the government's emphasis on collaboration between the parties. This can be observed

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<sup>1</sup> C Smart, *The Ties That Bind* (Routledge and Kegan Paul, 1984).

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<sup>3</sup> For example, Mediation Information and Assessment Meetings (MIAMs) are now compulsory for all couples that would like to make a court application to determine a private family law dispute unless an exemption applies. See Children and Families Act 2014, s 10.

<sup>4</sup> See Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, Cm 9321 (2016) para 1.5; Department for Work and Pensions, *Supporting Separated Families: Securing Children's Futures*, Cm 8399 (2012). Furthermore, it was suggested in the *Final Report of the Family Justice Review* (MoJ, 2011) that: 'Mediation and similar support should be used as far as possible to support individuals themselves to reach agreements about arrangements, rather than having arrangement imposed by the courts.' (Annex A).

<sup>5</sup> S McKay, 'Child Support, child contact and social class' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014); J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart, 2013) and A Diduck, 'Autonomy and family justice' [2016] CFLQ 133.

most readily in relation to child arrangements<sup>6</sup> but can also be observed in the family finance<sup>7</sup> and child support<sup>8</sup> contexts. This development is particularly significant now that legal aid has been removed from the vast majority of private family law cases and the prioritisation of private ordering of family disputes in an era of austerity.<sup>9</sup> Research has also emphasised how settlement is at the heart of outcome and solution-seeking processes and strategies for professionals within the family justice system.<sup>10</sup>

The word ‘settlement’ is loaded with connotations of agreement, conformity and harmony between the parties as regards both process and outcome. However, empirical research on settlement in financial remedy cases has concluded that divorcing couples conclude their affairs for a variety of reasons, not all positive, either in terms of process or outcome.<sup>11</sup> Furthermore, there has been much written about the potential difficulties with settlement outcomes, particularly from a gender perspective<sup>12</sup> and for the most vulnerable in society,<sup>13</sup> – to what extent does settlement provide a ‘just’ outcome as opposed to being ‘just about settlement’?<sup>14</sup>

With settlement, private ordering, autonomy and vulnerability occupying much academic literature on family justice, one area that remains under explored is the potential relationship between the route used by parties to achieve settlement of their

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<sup>6</sup> Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A system with children and families at its heart*, Cm 8273 (2012), at para 65.

<sup>7</sup> Ministry of Justice *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7967, (2010), at para 4.157.

<sup>8</sup> See Ministerial Foreword in Department for Work and Pensions, *Government response to the Consultation: Supporting separated families; securing children’s futures*, Cm 8742 (2013), at p 5.

<sup>9</sup> Ministry of Justice, *Reform of legal aid in England and Wales: The Government response*, Cm 8072 (2011), see Ministerial Foreword at p 3-4 and p 8 at para 10.

<sup>10</sup> For research on the various professions’ approaches to settlement within family justice see for example, G Davis, S Cretney and J Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Oxford University Press, 1994); E Hitchings, J Miles and H Woodward, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013); M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart, 2009); A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017).

<sup>11</sup> For example, see E Hitchings et al, *ibid*.

<sup>12</sup> See A Barlow et al, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017), ch 6 and T Wilkinson-Ryan and D Small, ‘Negotiating Divorce: Gender and the Behavioural Economics of Divorce Bargaining’ (2008) 26 *Law and Inequality* 109.

<sup>13</sup> See J Wallbank, ‘Universal norms, individualization and the need for recognition: the failure(s) of the self-managed post-separation family’ and A Diduck, ‘Autonomy and vulnerability in family law: the missing link’ both in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014).

<sup>14</sup> H Genn, *Judging Civil Justice* (Cambridge University Press, 2008), p 117.

family dispute and the role of law and justice:<sup>15</sup> is settlement regulated by the law and formalised by the court differently shaped and conceived from settlement informally delivered by the parties? The discussion in this article is prompted by this focus on settlement across the private family justice system. Most private family law decision-making is now undertaken outside of the official court system. As is well known, approximately 90% of separated parents make post-separation contact arrangements for their child(ren) without recourse to the courts.<sup>16</sup> Likewise, there is a research black hole concerning the two-thirds of couples who divorce but who do not obtain a financial order on divorce.<sup>17</sup> We have little understanding of this unknown cohort and their experiences of this ‘delegalised’ space:<sup>18</sup> are they agreeing or just ignoring financial and/or children issues? What are they settling for and how are they achieving settlement?

In the wake of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), there has been increasing interest in the potential diminution of family justice. Eekelaar has suggested that while it may be ‘too melodramatic to announce the death of family justice ... there is evidence that at least some policy-makers have a diminished concept of what constitutes justice in this regard.’<sup>19</sup> It will be suggested that exploring family justice by reference to the routes to settlement will enable an examination of the role of law and legal norms within these new justice spaces. This approach is particularly important given the focus and weight placed on achieving settlement within current policy discourse. While other conceptions of justice such as participatory or formally imposed justice,<sup>20</sup> procedural or substantive justice,<sup>21</sup> and

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<sup>15</sup> See A Barlow et al, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017) for an exploration of three paths to family dispute resolution: mediation, solicitor negotiation and collaborative law.

<sup>16</sup> A Blackwell and F Dawe, *Non-Resident Parental Contact* (ONS, 2003) and D Lader, *Omnibus Survey Report No.38. Non-resident parental contact, 2007-2008. A report on the research using the National Statistics Omnibus Survey produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families* (ONS, 2008).

<sup>17</sup> *Family Court statistics quarterly. Family court tables: January to March 2017* (MoJ, 2017) Table 11, which charts the decline in proportion of divorce cases started with financial remedy orders from 41% in 2003 to 32.4% in 2014.

<sup>18</sup> This new term has been used recently by L Smith, ‘Chasing Shadows: online information and advice on family law disputes’, paper presented at Leverhulme International Network Conference on New Families; New Governance, London: University of Notre Dame London Campus, September 2014. Available at: [http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/law/familyregulationandsociety/Speakers\\_Briefing\\_papers\\_all\\_sessions.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/law/familyregulationandsociety/Speakers_Briefing_papers_all_sessions.pdf). See also A Diduck, ‘Autonomy and family justice’ [2016] CFLQ 133 at p 136.

<sup>19</sup> J Eekelaar, ‘Not of the Highest Importance’: Family justice under threat’ (2011) 33(4) JSWFL 311, at p 311.

<sup>20</sup> L Parkinson, ‘The place of mediation in the family justice system’ [2013] CFLQ 200, at p 212.

<sup>21</sup> See discussion in H Genn, *Judging Civil Justice* (Cambridge University Press, 2008), pp 10-16.

outcome- or behaviour-focused approaches<sup>22</sup> all have their place within the current debate, family law's promotion of settlement, autonomy and private ordering requires that we examine family justice differently: through a settlement-oriented lens.

The title of this article is adapted from Carol Smart's book. In it, she examines the way in which private law 'sustains and perpetuates women's economic dependence within marriage and the family' by creating marriage as a legal status.<sup>23</sup> In drawing attention to the way in which law *indirectly legitimises* the 'preconditions which create an unequal power structure' of men over women in the familial household, the important element of Smart's argument is the appearance of neutrality which the law conveys. It is this appearance of neutrality – highlighted through the use of terms such as fairness, equality, settlement and autonomy – which make women particularly vulnerable during financial settlement negotiations.<sup>24</sup> While the financial implications of autonomy and settlement for women on divorce have been explored elsewhere,<sup>25</sup> this article will examine how the legal status of marriage (the ties that bind) can create entitlement and responsibility, but that the new norms of settlement, autonomy and private ordering potentially limit those legal consequences. Alison Diduck has explored the de-legalisation of family disputes in relation to the boundary between public and private concern by suggesting that the 'virtual de-legalisation of family disputes ... is pursued on an ad hoc basis by almost all participants in the system, and is supported by the ideology of autonomy'.<sup>26</sup> This article takes the analysis one stage further by focusing on how law is being used within each justice space and how, for example, law and legal norms may not bind the parties upon divorce and separation in the new post-LASPO era if parties choose a particular settlement route.

Rather than propose one all-encompassing conception of justice seen in cases of private settlement, the argument put forward here draws on empirical research to suggest that the conception of justice varies depending on the route to settlement. Three conceptions of justice can be identified which correspond with the settlement routes taken by individuals facing a family dispute: *official*, *operative* and *outsider* justice. In resolving their dispute, parties may operate within one or more of the justice spaces en route to achieving resolution of the dispute. Within these justice spaces it will be argued that the role of the law that creates legal entitlements is being increasingly downplayed, and correspondingly that the law within settlement diminishes accordingly. This raises important questions for the majority of the divorcing population who are 'outside' the formal justice system with respect to any

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<sup>22</sup> See J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart, 2013), p 8.

<sup>23</sup> C Smart, *The Ties That Bind* (Routledge and Kegan Paul, 1984), p xi.

<sup>24</sup> See for example, A Diduck, 'Autonomy and vulnerability in family law: the missing link' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014) and A Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287.

<sup>25</sup> See for example, H Fisher and H Low, 'Who Wins, Who Loses and Who Recovers from Divorce?' and D Price, 'Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality?', both in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart, 2009).

<sup>26</sup> A Diduck, 'Autonomy and family justice' [2016] CFLQ 133, p 136.

property or financial settlement. Individuals without legal support or judicial oversight are negotiating the terms of their own divorce without the formal legal framework to uphold rights and responsibilities becoming engaged. A key consequence of marriage is therefore at risk of being downplayed, missed or even ignored.

### **The three conceptions of family justice**

The following discussion is concerned with examining three different conceptions of justice. This will be achieved by drawing on evidence from various empirical studies to demonstrate how specific discourse on private ordering and settlement shapes this new justice paradigm. I will examine the role of law and procedure within each justice space (the type of justice being produced); the place of the dispute (where justice occurs, the most obvious example being the court); the method(s) used to resolve the dispute (what process is used to achieve justice, for example adjudication) and the relevant participants involved in the dispute (those who are *receiving* and *providing* justice). Drawing on this conceptual framework, I will suggest that as the settlement route moves further away from the *official* justice space, the role of the law is being increasingly downplayed and that this could leave many families vulnerable as a consequence. This is particularly apparent in relation to the potential simplification of legal rights and responsibilities when dividing assets or agreeing arrangements for children. While justice provided and received by the parties themselves may not necessarily mean injustice, the increasing absence of legal advice in the ordinary case reflects a concern suggested by Eekelaar and Maclean:

‘Although most issues are disposed of elsewhere in the family justice system, the judiciary remains at its core. This is because, quite simply, the purpose of a justice system is ultimately to safeguard people’s legal rights ... But it is one thing to take a responsible decision to compromise or abandon your legal rights; it is another thing to yield without any knowledge of what your rights are, or if you know them, to yield under undue pressure, or because you lack the means to protect them. The justice system is there to try to prevent those things happening. And a justice system is anchored in the judiciary.’<sup>27</sup>

At the heart of this quote is the centrality of the judiciary and formal justice in family justice. This formal approach to justice is therefore where I begin to outline my three conceptions of family justice and to argue that the role of the law lessens as settlement moves away from that system anchor.

### **Official justice**

Official justice occurs inside *and* outside of the formal justice setting of the courtroom. As Eekelaar and Maclean’s quote emphasises, judicial determination of an issue is typically associated with formal justice. While the formal court environment is an essential component of official justice, this conception encompasses a broader range of settings. Instead, the development of a settlement-oriented analysis enables justice to be considered through the route to settlement. Using this analytical approach, official justice can therefore also take place beyond the court. Outcomes are

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<sup>27</sup> J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart, 2013), p 8-9.

not only delivered through the traditional methods of adjudication and pre-hearing settlement formalised in a consent order, but also through the state-endorsed administrative mechanisms by which child support is calculated and collected; through the settlement routes of arbitration and collaborative law; via the potentially binding nature of pre-nuptial agreements which take place outside of the court but negotiated through solicitors; and through consent orders which are negotiated outside of the court setting but which must be sent to court for approval. The key association between these routes to official justice is the prescribed nature of that settlement path with predetermined and defined legal principles and/or formula used to assist or determine the outcome in a given case. In the case of collaborative law, for example, the path to any potential settlement is laid down in a formal collaborative agreement between the parties with legal principles assisting in the generation of an agreement. The legal principles themselves may be statutory or judicial, discretionary or even rule-based, but the key issue is that those who are making use of, interpreting and/or applying these rules (the participants) are doing so within prescribed and recognised boundaries. While in many instances, the ‘outcome’ in official justice will be legally binding (formal adjudication and consent orders), this does not necessarily have to be the case. For example, in the case of pre-nuptial agreements, an outcome-focused as opposed to settlement-focused analysis would suggest that pre-nuptial agreements do not fall within an official justice conception. Not only is the agreement inchoate until the parties’ divorce but the agreement is deliberately intended to provide for a different result to that provided through a formal judicial determination. However, by using a settlement lens for the analysis, the use of solicitor negotiation to reach a potentially binding agreement means that predetermined and defined legal principles (for example, judicial guidance in *Radmacher v Granatino*<sup>28</sup>) will assist in the determination of an outcome that should be upheld by a court in the event of the couple divorcing.<sup>29</sup> What places this within the margins of official justice is the fact that a couple have negotiated their agreement using solicitors and relying on legal advice, in a prescribed and formal manner. This results in an agreement that will bind a future court unless it would be unfair to the parties to do so. The issue for solicitors is ensuring that any agreement is recognised and to ensure that it has determinative weight. Formality and independent legal advice are currently the best means of achieving this. As one solicitor interviewee suggested in the pre-nuptial agreement research study:<sup>30</sup>

You can’t avoid but advising them on the situation that if they did divorce and if you didn’t have a premarital agreement, what the possible results would be. If they did have a premarital agreement and one sought to go beyond it and argue against its validity, what factors would we look at and what would that result in.

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<sup>28</sup> [2010] UKSC 42.

<sup>29</sup> Ibid, para 75; the agreement will be upheld unless it would be unfair to the parties to hold them to the terms of the agreement.

<sup>30</sup> Despite the qualitative data for this study being collected pre-*Radmacher*, the data illustrates the perennial nature of the issues. See E Hitchings, *A study of the views and approaches of family practitioners concerning marital property agreements* (Law Commission, 2011). The qualitative sample was drawn from two focus groups comprising 10 practitioners in total and 29 interviews. The focus groups took place in London and a regional city in the south of England, with the interviews comprising practitioners from London and a northern city.

... So you do have to go through those whole scenarios with the clients, to make sure they're fully aware of what they're entering into. (Solicitor interviewee)

Consequently, although pre-nuptial agreements are negotiated outside of the court environment and are only anticipatory to the parties' potential divorce, it is suggested that they fall within the outer margins of official justice due to, inter alia, the use of solicitors to draft the agreement, legal principles being used to assist in the process of both negotiation and drafting, and the potential weight associated with it post *Radmacher*. Bargaining in the shadow of the law<sup>31</sup> is therefore another key component of official justice.

In the official justice space, legal principles and procedures are prescribed and recognised by the participants, and settlements are negotiated and formalised in the shadow of the law. The shadow here is at its darkest and most intense. The law has its most direct and obvious impact within the official justice space where its shadow is most clearly evident and where formality and 'formal' law are particularly significant. This can be seen to best effect by drawing upon the example of consent orders.

While consent orders can be drafted outside of the formal justice environment (by mediators and litigants in person),<sup>32</sup> many consent order applications will be drafted by solicitors who inhabit the official justice space.<sup>33</sup> Official justice focuses on the use of formal legal principles to frame the terms of any agreement made between the parties, although as research has demonstrated, factors contributing to settlement are rarely simple.<sup>34</sup> Where couples have resort to the court, official justice will be served at least in a procedural manner. The consent order will be checked by a district judge against the legal rules and objectives of that system. However, in an era when consent orders are being routed through mass production lines in large regional divorce centres, the amount of scrutiny (and therefore substantive justice) that such consent orders can be given is unclear and unknown.<sup>35</sup> As an indication of the potential problems with 'mass inspection' of consent order applications, one of the participants in a recent judicial focus group for the Hitchings and Miles financial remedies settlement project, spoke to this type of problem when reflecting on a potentially unfair consent order application in a scenario presented to them:

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<sup>31</sup> R Mnookin and L Kornhauser, 'Bargaining in the shadow of the law: the case of divorce' (1979) 88 *Yale Law Journal* 950.

<sup>32</sup> Drafting consent orders is not one of the six reserved activities under the Legal Services Act 2007, ss 14-17. The six reserved legal activities are: the exercise of rights of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.

<sup>33</sup> E Hitchings, J Miles and H Woodward, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), p 52.

<sup>34</sup> See for example E Hitchings et al, *ibid*, in particular Table 4.1 at p 86-87.

<sup>35</sup> For further discussion, see J Miles and E Hess, 'The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units' [2016] *Fam Law* 1335, and M O'Dwyer, E Hess and J Miles, 'Financial Remedies Courts' [2017] *Fam Law* 625, where the authors suggest the introduction of specialist financial remedies courts to address, inter alia, problems associated with judicial inconsistency in the handling of financial remedy cases.



[In] a divorce unit where [they] do fifty of these in a day, [they] don't have the time to start mucking about with these. If they look okay on paper, [they're] not going to... If there's an obvious query [they're] going to raise it, but ... [sentence tails off]

(District Judge focus group participant)<sup>36</sup>

In the *Mapping Paths* study, Anne Barlow et al concluded that the 'law casts the deepest and most extensive shadow over solicitor negotiations, with the process being focused on the application of legal principles and the default option of a court determination. ... The law casts a lighter but still discernible shadow over mediation.'<sup>37</sup> While this tallies with the official (and operative) shadow analysis suggested here, Barlow et al also suggest that the shadow that appears in collaborative law is much less defined and that 'it appears to fall most lightly of all on collaborative law processes.'<sup>38</sup> Given the placement of collaborative law within official justice, at first glance, this appears to run counter to the argument suggested here. However, the shadow exercised in the official justice space does not necessarily have to be of the same intensity in each official settlement pathway and as Barlow et al recognised, the more discernible shadow of the law observed in the mediation process was due in large part to solicitors playing an important role 'in helping to bring the shadow of the law to bear on mediation' and that this will have been 'substantially diminished by the LASPO legal aid reforms with the possible result that the law has become less normative in mediation.'<sup>39</sup> Furthermore, Barlow et al and Mark Sefton in his research report into collaborative law, do not suggest that law, nor its shadow, is absent in the collaborative process, with both reflecting on legal advice<sup>40</sup> and legal norms 'providing a framework for clients in negotiations'.<sup>41</sup> Lawyers in the collaborative process have always been able to provide legal advice to their clients, unlike mediation, where mediators provide only legal information, albeit with different levels of intervention and even directivity.<sup>42</sup> On this basis, it seems appropriate to suggest that the law's shadow, particularly in the post LASPO era, may become stronger within collaborative law compared with mediation, particularly without the ongoing presence of lawyers.

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<sup>36</sup> The financial remedies settlement project was a mixed methods study which comprised a court file survey of just under 400 financial remedy cases from four courts around England in 2012 and 32 interviews with solicitors and mediators from those four areas during 2012-2013. This data was later supplemented with two focus groups with first instance judges from local courts (14 judges) in 2016. For further discussion of the methodology for stage one of the study, see E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), Appendix A.

<sup>37</sup> See A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017), pp 184-94.

<sup>38</sup> Ibid, p 194.

<sup>39</sup> Ibid, p 194.

<sup>40</sup> Ibid, p 194.

<sup>41</sup> M Sefton, *Collaborative law in England and Wales: early findings. A research report for Resolution (Summary)* (Resolution, 2009), p 5.

<sup>42</sup> E Hitchings and J Miles, 'Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum' (2016) 38(2) JSWFL 175.

Participants experiencing official justice will typically find themselves using either the formal channels of the Child Maintenance Service (CMS); using the services of an arbitrator or solicitors in a collaborative law framework; negotiating their private family dispute through solicitors; or having their case adjudicated or consent order approved at court. While these individuals will be the recipients of official justice, the body or individual implementing justice will vary depending on the route to settlement. In the case of arbitration, adjudication and the CMS, those implementing official justice are respectively, the arbitrator, judge or CMS administrative mechanisms. Within collaborative law and solicitor negotiation the implementor is less obvious. Where these negotiations result in an agreement which is formalised by a consent order, justice will be implemented by the judge. When this settlement path is unsuccessful, individuals are faced with three justice paths: maintain the official route and opt for formal adjudication where justice will once again be implemented by the judge adjudicating in the case; or the parties can withdraw into the operative or outsider justice spaces where the body or individual implementing justice is less clearly defined.<sup>43</sup> Given the variety of settlement paths available, parties are able to move from one justice space to another. In doing so, it is both the route and destination that defines the type of justice that the parties are using. Parties can negotiate their agreement within any of the justice spaces and can then move elsewhere to implement it. The consequence being that some individuals may experience more than one justice space in the quest for settlement.

However, the option of official justice is becoming increasingly limited to certain constituents within the population. Participants who are undertaking or receiving justice in the official space are a small and diminishing group. Collaborative law for example, is a minority pursuit.<sup>44</sup> According to the most recent Family court statistics, only 32.4% of all divorce cases started in 2014 had a financial remedy order. This is a notable reduction from 41% of all divorce cases only a decade earlier.<sup>45</sup> It therefore seems inevitable that in the wake of legal aid cuts, only those who are able to obtain legal aid through the exception routes,<sup>46</sup> parties who have a particularly high conflict case,<sup>47</sup> are particularly vexatious,<sup>48</sup> or those who can simply afford to go to court and

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<sup>43</sup> See discussion of the operative and outsider spaces below.

<sup>44</sup> See for example, E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), Chart 2.1 at p 36.

<sup>45</sup> *Family Court statistics quarterly. Family court tables: January to March 2017* (MoJ, 2017), Table 11.

<sup>46</sup> Legal Aid Sentencing and Punishment of Offenders Act, s 10 and Sch 1.

<sup>47</sup> See Table 4.1 in E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), pp 86-87 for a range of factors which have been identified as influencing or precluding settlement in financial remedy cases. In particular the personal characteristics of the parties including their emotional situation and their lack of willingness to engage with one another, as well as lack of disclosure, are some of the factors which are more likely to lead to the dispute resulting in a court application.

<sup>48</sup> A number of previous empirical studies have referred to the unmeritorious, high conflict or serial litigant case within the court: See L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in person in private family law cases* (MoJ, 2014), ch 2 and L Trinder, J Hunt, A

have some form of property, pensions or income to argue over<sup>49</sup> will be able or willing to afford the associated increased costs of a court hearing,<sup>50</sup> as the following quote from the Hitchings and Miles financial remedies settlement research highlights:

And you tend to find with the finances – the wealthier people want the protection more. So they're the ones who want to pay for that protection of a Consent Order. (Solicitor interviewee)

To a large extent, official justice appears to have become a two-tiered system. Court-based solutions and solicitor-led settlement routes will be available for those who can afford it at one end of the scale, while at the other end, poorer groups and the vulnerable (apart from those still eligible for legal aid) will be forced into the operative and outsider justice spaces. However, the exception within the official space is child support, where data emphasises how vulnerable and poorer groups have been more reliant on official justice rather than operative or outsider justice. These groups have been the major users of formal, statutory routes in the past. In his analysis of two large-scale datasets,<sup>51</sup> Stephen McKay suggests that there is a class/money distinction in the types of 'calculation and collection' system for child maintenance, with the use of statutory agencies 'most common for non-working and lower social class recipients. ... In other words, the key means of assessing and paying child support that the government is trying to promote, voluntary agreements, are least common for the poorest families.'<sup>52</sup> This is unsurprising given the previous statutory requirement for parents with care who were in receipt of benefits being compelled to comply with the Child Support Agency and therefore forced to use official justice.<sup>53</sup> It is also reflective of need of these groups to rely on public services, compared with the

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Macleod, J Pearce and H Woodward, *Enforcing contact orders: problem-solving or punishment?* (University of Exeter, 2013), ch 5.

<sup>49</sup> A recent survey of court file data on cases in which a petition for divorce had been issued on or after 1 April 2009 and a final financial remedy order had been made on or before 31 December 2010, found that, despite the data being collected whilst legal aid was still available (for lower income cases), the median net income for *husbands* in the file survey data was £21,996 pa and the median net income for *wives* was £15,300 pa. The median total net capital including the family home was £113,515. H Woodward with M Sefton, *Pensions on Divorce: An empirical study* (Cardiff University, 2014), p 19.

<sup>50</sup> House of Commons Justice Committee, *Courts and tribunals fees*, Second Report of Session 2016-2017, HC 167.

<sup>51</sup> The Family Resources Survey and Understanding Society. For a more detailed methodology see S McKay, 'Child Support, child contact and social class' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014), p 173.

<sup>52</sup> *Ibid*, p 176. See also N Maplethorpe, J Chanfreau, D Philo and C Tait, *Families with children in Britain: Findings from the 2008 Families with Children Study* (Department for Work and Pensions, 2010), p 365 and table 15.1, where the data demonstrated that: 'Families who received a CSA assessment only [there was no other child maintenance agreement in place] were more likely to be social tenants (54 per cent) than private tenants (39 per cent) or living in owned (or mortgaged) accommodation (23 per cent) (see Table 15.3).'

<sup>53</sup> Child Support Act 1991, s 6.

invisibility and privacy that the middle classes can afford.<sup>54</sup> Whether this socio-economic division continues with the removal of compulsion will depend on the willingness, capability and viability of the parents concerned to negotiate without risk or difficulty, or even at all.

Having identified the place of dispute and the participants involved, the following section will examine the type of justice being produced within the official space including the methods used to obtain justice. As discussed previously, the most obvious types of official justice are adjudicated decisions through the use of legal principles which are prescribed and recognised by all participants in the process. However, the official justice space in private family law encompasses more than pure formal *adjudicated* justice. Private family law disputes in the courts are addressed through a ‘problem-solving, future-oriented approach’,<sup>55</sup> which means that official justice is much more than the application of formal legal rules and is a further reason why the import of law and its shadow can vary across different family justice paths. In drawing attention to this approach in lower value financial remedy cases, solicitors and judges are generally practical and pragmatic.<sup>56</sup> In the Hitchings and Miles financial remedies settlement research, one of the participants in the judicial focus groups emphasised this problem-solving approach to financial remedy disputes when discussing a needs-based scenario:

‘But I would always look into it and they don’t need a four-bedroom house, two boys of not dissimilar age can share a room. People do and they might move to a less fashionable part of [county]. You know one’s got to look at the practicalities and it’s no good getting too sentimental about the children’s home, because home is where the heart is.’ (District Judge focus group participant)

This is a useful example of how even within official justice, the focus is on ‘problem-solving’ within family disputes. The discretion inherent within s 25 Matrimonial Causes Act 1973 ‘justice’ opens up this area of private family law to a discourse framed around personal problems in addition to, or even, rather than legal disputes.<sup>57</sup> In the post LASPO landscape, this enables the legal services market to develop in ways which focus on individuals’ vulnerabilities and their support needs and provides a more legitimate opportunity to emerging service providers in the unregulated sector.<sup>58</sup>

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<sup>54</sup> My thanks to Joanna Miles for raising this point.

<sup>55</sup> L Trinder et al, *Enforcing contact orders: problem-solving or punishment?* (University of Exeter, 2013), p 37.

<sup>56</sup> See for example, E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013) and K Wright, ‘The role of solicitors in divorce: a note of caution’ [2007] CFLQ 481.

<sup>57</sup> A Diduck, ‘Autonomy and family justice’ [2016] CFLQ 133 at p 143.

<sup>58</sup> Fee-charging McKenzie Friends for example have come to the fore in recent years as one means of plugging the post-LASPO support gap. A quick trawl of websites will see a range of ‘professional’, and yet unregulated, McKenzie Friends charging for their support services. See Society of Professional McKenzie Friends: <http://www.mckenziefriends.directory/index.html>

Therefore, in response to Eekelaar and Maclean's quote at the beginning of this section, it is increasingly problematic to assert that the current family justice system is there to try to prevent individuals abandoning or compromising their legal rights. It is also problematic to assert with any confidence that formal justice is available for all when one considers the reality of the resolution of private disputes for the majority of divorcing and separating couples; the mounting hurdles to formal justice with the increase in court fees and the unavailability of legal aid; the focus on settlement outside of the formal justice system and an emphasis on mediation and forms of dispute resolution other than the courts. Official justice relies on the trained insider to navigate and negotiate through the system. However, for those unable to afford the cost of professionals trained in the ways and means of these formal routes, the system remains complex and difficult to comprehend without support.<sup>59</sup> Ultimately, settlement regulated by the law (whether inside or outside of the formal court environment) is distinct from settlement informally delivered by the parties in terms of the way justice is shaped and conceived. Official justice is, in the main, delivered and takes place in the more direct shadow of the law. But this shadow becomes much more hazy and less defined as we move into the next private family justice space: 'operative' justice.

### **Operative justice**

Operating between the margins of official and outsider justice, the type of justice that is being produced within this relatively small space is primarily functional and pragmatic. Operative justice focuses on outcomes that will work for the parties, with the possibility of some use of legal principle to assist along the way. The key distinction between operative justice settlements and official justice settlements is that the latter are settled within a more direct shadow of the law *and* either formally approved by law (either through consent orders or adjudication), or formal process (collaborative law), or are entered into in anticipation of a formal legal event where the agreement will be upheld unless it is unfair to the parties to hold them to the terms of the agreement (pre-nuptial agreements). Operative justice settlement is not necessarily constrained by these formalities; it can be a stepping-stone en route to official justice or the parties can simply use the operative environment for the entirety of their dispute. This will result in a non-legally binding agreement if settlement has been reached. As Lord Atkin noted in *Hyman v Hyman*:

'In my view no agreement between the spouses can prevent the Court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, "having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties." The wife's right to future maintenance is a matter of public concern, which she cannot barter away. This is not to say that in any particular case the Court must make an order; still less that in this case it must do so.'<sup>60</sup>

A focus on the operative family justice space has been a key component of government policy in recent years. For individuals accessing operative justice, the site

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<sup>59</sup> See Trinder et al, *Litigants in person in private family law cases* (MoJ, 2014).

<sup>60</sup> *Hyman v Hyman* [1929] AC 601, at 629.

of the dispute is outside of the formal court arena, in particular, Alternative Dispute Resolution (ADR). Operative justice takes places through the services of regulated and unregulated family justice providers<sup>61</sup> such as mediators and more recently, other emerging family justice system operatives such as fee-charging McKenzie Friends who are using the post LASPO funding gap to develop their own private family justice services. Although fee-charging McKenzie Friends assist litigants in person (LiPs) in both the official and operative settings, recent research by Smith et al<sup>62</sup> has found that the majority of work undertaken by fee-charging McKenzie Friends takes place outside of the court. Crucially, the advice and assistance provided by McKenzie Friends is not regulated and neither do they have any official standing within the court (for example automatic rights of audience).

The numbers *and* proportion of the separating population who opt for mediation<sup>63</sup> and fee-charging McKenzie Friends<sup>64</sup> are small. Recent legal aid figures show that the numbers of mediation starts and mediation outcomes continue to drop,<sup>65</sup> while Barlow et al have highlighted that less than 1% of the population who separated between 1996 and 2011 went directly to mediation.<sup>66</sup> Furthermore, despite Mediation Information and Assessment Meetings being made compulsory<sup>67</sup> the same legal aid statistics show that the number of mediation assessments has also continued to drop.<sup>68</sup>

A key feature across both official and operative justice, is the practical and pragmatic approach to achieving justice, emphasised through problem-solving and functionality of outcomes. This can be seen by reference to child maintenance. One of the main

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<sup>61</sup> See Competition and Market Authority, *Legal services market study: Final Report* (CMA, 2016) for a discussion about the emerging unauthorised providers.

<sup>62</sup> See L Smith, E Hitchings and M Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (Bar Council, 2017).

<sup>63</sup> In research that was conducted prior to the implementation of LASPO, most financial remedy arrangements that result in a consent order are reached through solicitor negotiation and informal discussion. See E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), p 36.

<sup>64</sup> See L Smith et al, *A study of fee-charging McKenzie Friends and their work in private family law cases* (Bar Council, 2017) pp 14-15 for an estimation of the number of fee-charging McKenzie Friends (approximately 100). This low estimate, combined with the figures supplied at p 62 of the report (the number of hearings involving McKenzie Friends) suggests that the numbers and proportion of the separating population opting for assistance and support from fee-charging McKenzie Friends would likewise be small.

<sup>65</sup> In the full year prior to LASPO being implemented (2012-2013), there were 9060 successful mediation agreements funded by legal aid. Following LASPO's implementation, the number had reduced to 4,602 in 2016-17. *Legal aid statistics England and Wales tables January to March 2017* (MoJ and Legal Aid Agency, 2017), table 7.2.

<sup>66</sup> A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* (Exeter University, 2014) p 6.

<sup>67</sup> Children and Families Act 2014, s 10

<sup>68</sup> *Legal aid statistics England and Wales tables January to March 2017* (MoJ and Legal Aid Agency, 2017), Table 7.1.

planks of government policy has been to shift the responsibility of child maintenance onto parents' shoulders with a mixture of carrots and sticks designed to encourage people to make family-based arrangements instead of using official justice routes – the courts or the statutory scheme. In one sense, this shift is an example of child support moving beyond the official and operative spaces and into outsider justice as the focus is on private ordering outside of any official routes to justice. However, with the online child support guidance and calculator available as a tool for parties, statutory (legal) guidance is being provided online, providing a functional operative tool for parents in need of some focused support. Given that the state has taken responsibility in setting out this formula and making a calculation tool available, the child maintenance 'gateway'<sup>69</sup> could, in one sense, be classified as providing official justice for the parties. However, the online child maintenance tool and the creation of the child maintenance gateway are examples of methods of operative justice: use of the tool is not mandatory and couples are free to negotiate around the figures provided with individual negotiation and bargaining being promoted against a background of legal norms and principle. Crucially, any arrangement between the parties will be informal and not legally binding. Once again, individual responsibility and autonomy are key, but unlike the official space, the parties themselves implement and enforce their own 'operative' justice. Through the use of online guidance, the government is attempting to prioritise functional and pragmatic justice that will 'work' for the parties because there is no requirement for the child support calculator to be rigidly followed. Without any formal agreement or official mechanisms to enforce the parties' informal arrangements, this is the point at which we leave any semblance of official justice behind and move fully into the operative space. In theory, both parties remain entitled to apply to the Child Maintenance Service for an 'official' calculation and to obtain enforcement of any child maintenance obligations, but doing so will move them from the operative into the official justice space.

Parties within the operative space are encouraged to come up with an agreement that will work for them. The recipients of operative justice are therefore individuals who are either able to receive legal aid for mediation or have the funds available to pay for the regulated or unregulated service providers within the operative space. For recipients of operative justice in relation to child support, they are expected to be 'digital self-servers – people who have the skills, access and motivation to use digital services unaided.'<sup>70</sup> However, less than one-third of the UK population<sup>71</sup> is currently classed in this way despite a policy framework that encourages the majority of parents to rely on this online support to assist them in their familial dispute.<sup>72</sup> Faced with a low proportion of the population who have the requisite skills and facility to rely on this operative framework, the potential result is that for these parents, any child maintenance agreement and subsequent payment may be below the recommended

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<sup>69</sup> Individuals who wish to make use of the statutory Child Maintenance Service must first have a 'gateway conversation' in order to establish whether it would be possible to make a private maintenance arrangement instead. See Child Support Act 1991, s 9(2A).

<sup>70</sup> Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, Cm 9321 (2016), para 7.1.3

<sup>71</sup> Ibid.

<sup>72</sup> D Henshaw, *Recovering child support: routes to responsibility*, Cm 6894 (2006).

statutory levels or non-existent.<sup>73</sup> Furthermore, McKay's analysis of the class/money distinction in the types of 'calculation and collection' system for child maintenance, highlights how the richer groups and middle classes are most likely to use voluntary agreements (approximately six out of ten recipients),<sup>74</sup> although the proportion that have used the online tools to achieve that outcome is unknown. As McKay argues: '...for many middle-class families the reforms to child support are largely irrelevant. They have reliable child support agreements in place. It is those more vulnerable families who are more likely to use the statutory system, and hence have more to lose from policy that shifts to greater individual responsibility, and where the residual state backup is likely to be costly.'<sup>75</sup>

Within operative justice, a focus on 'problem-solving' could leave some families vulnerable as a consequence of potential simplification of legal rights and responsibilities. Alison Diduck argues that 'there is a broader concern if individualised, therapeutic problem solving is said, as it is, to be part of a justice system, but is not scrutinised, regulated or governed by the rules or objectives of that system, including the rule of law, equality, substantive fairness and due process.'<sup>76</sup> For example, agreements that have been self-negotiated or agreed through a mediator may only be examined through a legal lens if such an agreement is brought before the court via an application for a consent order. The process of operative justice therefore centres on the use of 'individually negotiated norms'<sup>77</sup> to arrive at settlement. However, these individual norms can result in dispute as well as agreement. In the *Mapping Paths* study, Barlow et al highlighted how the individual norms held by each party differed in relation to whether the dispute was about children or finances, and these norms were also gendered. In children's matters, for example, the predominant norms held by mothers were child welfare and the status quo position, but for fathers, rights and formal equality were central.<sup>78</sup> Operative justice settlements therefore concern familial disputes where the parties' individual positions are brought to the fore. During the negotiation process, parties may have some legal awareness, but the focus on individually negotiated norms leaves only a limited role for the law to cast its shadow.

The law's shadow is much more diffuse in operative justice than in the official justice space. For instance, on an orthodox view of mediation, mediators do not give legal advice. They will only provide neutral legal information and signposting to clients during mediation. The provision of tailored individualised legal advice is the preserve

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<sup>73</sup> See C Bryson, A Skipp, J Allbeson, E Poole, E Ireland and V Marsh, *The Kids Aren't Free: the child maintenance arrangements of single parents on benefit in 2012* (Nuffield Foundation, 2013), p 10, where it was found that 64% of single parents on out-of-work benefits do not receive any child maintenance from their child's other parent and 43% have no child maintenance arrangement in place at all.

<sup>74</sup> S McKay, 'Child Support, child contact and social class' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014), p 176.

<sup>75</sup> *Ibid*, p 177.

<sup>76</sup> A Diduck, 'Autonomy and family justice' [2016] CFLQ 133, at 136.

<sup>77</sup> L Webley, 'When is a Family Lawyer a Lawyer?' in M Maclean, J Eekelaar and Bastard, *Delivering Family Justice in the 21<sup>st</sup> Century* (Hart, 2015), at p 308.

<sup>78</sup> A Barlow et al, *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* (Exeter University, 2014), p 22.



of the solicitor who, on the same orthodox view, would also draft the consent order. In this scenario, the clients would therefore move from the operative to official justice space. The current debate about whether mediators should be able to draft consent orders<sup>79</sup> not only highlights the way in which the law's shadow becomes more diffused in the operative setting, but also the potential for an increasingly limited role for the law within operative justice and the blurred boundaries between official and operative justice. While settlement of a private family law dispute through mediation is an example of operative justice, the process of drafting the consent order moves it from the operative to official justice space. In one sense this highlights why the process is controversial. Mediators are neutral facilitators within the process of settlement discussion. They do not have an official justice 'tag'. They are implementing operative justice within the system. While the proposal to allow mediators to draft consent orders is a pragmatic and practicable solution to a problem,<sup>80</sup> it offends the very nature of official justice. The type of justice being produced by official justice is at its heart substantive justice based on, or negotiated within the boundaries of legal norms and principles which are prescribed and recognised. The mediator is not part of the official justice system and their role is not to start the official justice process through the drafting of a consent order. Although a judge will be required to approve any consent order that is drafted, in the days of mass judicial approval of consent orders via divorce centres, there is no research which informs us as to whether a District Judge will be alert to a potentially unfair financial consent order application, particularly if it is apparent from the court file that there has been no clear legal input. Furthermore, while some participants in the mediation process will have received independent legal advice during the course of the mediation itself, there is no guarantee that either party will have done so. Not only does this highlight how there is potential for the role of law within operative justice to be downplayed or even absent, but the role of legal expertise is diminished. In order to provide more affordable operative justice, the more costly official justice is increasingly being sidelined. As various settlement routes move further away from the official justice space, many families could be left vulnerable as a consequence of potential simplification of legal rights and responsibilities, particularly when dividing assets, but also agreeing upon arrangements for children. Those who require official justice to validate any agreement should have their dispute and any outcome framed by legal rules and principles by someone operating within that space who has expertise and knowledge of those legal norms. An orthodox understanding of the role of solicitors and individualised legal advice during mediation provides parties with

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<sup>79</sup> Family Mediation Council, *Consultation: Family Mediators Drafting Consent Orders* (FMC, 2016).

<sup>80</sup> The old version of the Family Mediation Code of Practice was silent on the issue of whether mediators should be allowed to draft consent orders. The orthodox model of family mediation provides that the mediator and solicitor roles are complementary, with the parties' solicitors giving partial legal advice on any mediated agreement. There are increasing reports that mediation clients want a 'one-stop shop' and there have been anecdotal reports of mediators drafting consent orders for their mediation clients.

that legal safety net which is not provided by legal information alone,<sup>81</sup> nor through mediators drafting consent orders.

Problem-solving and pragmatism are key elements within operative justice. Pre-LASPO, mediation fulfilled various government objectives in this regard, while in the post-LASPO landscape, the legal services market has developed to provide support for individuals who are unable to afford experts from the official justice space (lawyers) but who speak to the needs of this group (for example, fee-charging McKenzie Friends). With ‘problem-solving’ becoming an accepted discourse, family law beyond official justice has become couched in and framed around personal problems rather than legal disputes.<sup>82</sup> Providers in the new legal services market have therefore responded to these needs by providing a support service offering help and assistance in navigating the official justice space. Operative justice relies on the capacity of individuals to self-produce justice particularly with regard to understanding the nature of their own private family dispute, whether that is in terms of finances or the welfare of their children. This is reasonable when both parties are fully autonomous individuals, but there remain questions over substantive justice where this is not the case particularly as settlement produced within the operative space takes place beyond the direct shadow of the law.

### **Outsider justice**

Commentary and research to date has largely focused on those family disputes formalised by the court process or those outside the formal system but still engaged in some element of it, whether as a LiP, a client of mediation, or another means of accessing some form of operative justice. However, the majority of separating couples now take a ‘DIY’ approach to managing family breakup. Around 90 per cent of separating parents do not use the courts to formalise child arrangements<sup>83</sup> and approximately two-thirds of couples who divorce each year do not pursue any financial legal remedies through the courts.<sup>84</sup> This ‘DIY’ population in this delegatised space are therefore the main participants *in* and recipients *of* outsider justice: the *where* and *who* of outsider justice. To date, there has been little research into this large, silent majority of the divorcing and separating population that fails to get any formal recognition of their financial separation or child arrangements.<sup>85</sup> Consequently, this delegatised space is a key site for new empirical research in the post-LASPO era, in particular, examining the effects of delegatisation on families

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<sup>81</sup> For further discussion, see E Hitchings and J Miles, ‘Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum’ (2016) 38(2) JSWFL 175.

<sup>82</sup> See J Masson, ‘Thinking about contact – a social or a legal problem?’ [2002] CFLQ 15, about how contact is very narrowly construed as a legal problem.

<sup>83</sup> A Blackwell and F Dawe, *Non-Resident Parental Contact* (ONS, 2003).

<sup>84</sup> *Family Court statistics quarterly. Family court tables: January to March 2017* (MoJ, 2017) Table 11.

<sup>85</sup> For some research and discussion, see S Arthur, J Lewis, M Maclean, S Finch and R Fitzgerald, *Settling Up: making financial arrangements after divorce or separation* (National Centre for Social Research, 2002) and D Marjoribanks, *Breaking up is hard to do: Assisting families to navigate family relationship support before, during and after separation* (Relate, 2015).

within this population and what online and offline support mechanisms families are using during the course of their family dispute.<sup>86</sup>

The answers to these questions are unknown to both researchers and the family justice system. Yet, even in the absence of research on this population, the family justice DIYer is being encouraged to put together his or her own settlement and has become the idealised disputant as far as policy is concerned. In addition to the expectation of being able to be ‘digital self-servers’,<sup>87</sup> this idealised ‘outsider’ is someone who is able to deal with the emotional and practical fallout arising from relationship breakdown in order to settle their dispute outside the court system, the corollary being that those who require the assistance of the court in their family disputes are settlement failures:

‘... (The legal aid) reforms do violence to the most vulnerable separating parents, the 10 per cent, by highlighting their prescribed distinctiveness from the majority. The fact that they are singled out as failing to achieve the desired norm of agreement demeans them. This is consolidated by the strength of the norms that parents *should* assume responsibility for coming to agreements themselves ...’<sup>88</sup>

While those needing recourse to the court are characterised as settlement ‘failures’ – individuals who have been unable to ‘develop the requisite skills to come to their own agreement’<sup>89</sup>, the 90% in children disputes and the two-thirds of the divorcing population for financial issues, are perceived as settlement successes; individuals who have been able to self-manage their relationship dispute without demanding the use of the court. This discourse reinforces the position of settlement as a key norm within family justice.

The concept of ‘outsider’ justice has its origin in the *type* of justice that is being delivered and the role of law and procedure in that delivery. Ex-partners who engage in non-formal means to settle their disputes are acting beyond the formal routes of justice (notionally) available to them – they are ‘off-radar’ and are fully autonomous individuals from a family justice system standpoint and therefore have no need of legal involvement. From a procedural perspective, they are outside the formal family justice system. But that means that if these couples are settling their disputes then they are not obtaining consent orders for their cases. Without a consent order, couples do not receive the consequent benefits of certainty and finality by formalising any

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<sup>86</sup> Further research questions may include: whether ex-couples remain in an unsettled dispute or whether they obtain settlement? The reasons why couples do not formalise their separation? How is any settlement achieved? Do these informal settlements work? What are the short and longer-term outcomes for the parties and any children? Do couples experience any compliance issues and if so, how are these addressed?

<sup>87</sup> Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, Cm 9321 (2016), para 7.1.3.

<sup>88</sup> J Wallbank, ‘Universal norms, individualization and the need for recognition: the failure(s) of the self-managed post-separation family’ in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014), p 92.

<sup>89</sup> *Ibid*, p 75

separation agreement.<sup>90</sup> In interview data that was collected in the Hitchings and Miles financial remedies settlement study prior to the implementation of LASPO, the following solicitor discussed the effect of LASPO on their clients who at that point were in receipt of legal aid:

‘A lot of them, especially when they have very minimal assets, they aren’t going to be too concerned about the Consent Orders – because we find that already. ... Finances – if there’s nothing to get, they’re not going to spend the money to try and get that clean break in any event.’  
(Solicitor interviewee)

As this quote highlights, the ‘DIYer’ within the family justice system is not a new creature that has emerged since LASPO. The delegatised space has always been present. But LASPO and corresponding government policy across private family law has focused attention on the increasing numbers of couples who remain, or choose to conduct their dispute outside of the official family justice system, or simply find themselves there, wilfully or not. As discussed previously, research is yet to clarify the route they have used which may, or may not result in ‘settlement’, or the capacity of individuals to self-produce justice without any formal family justice system mechanisms in place to assist. Indeed, an overriding question remains – are the majority actually ‘settling’, or is the ‘settlement’ between DIYers being achieved through agreement, passivity, coercion, compliance or uncertainty?

A further element of outsider justice is the *type* of justice that individuals are subject to when settling their family disputes. Policy documents emphasise how the role of law within private family disputes generally is being downplayed and the corresponding discourse focuses on an individual’s autonomy and personal life choices.<sup>91</sup> By focusing on the discourse of autonomy within private family disputes, the family dispute DIYer is being actively encouraged by the state to plough their own furrow when it comes to arranging their private family matters. Legal rights and responsibilities appear to be pushed to one side, or at least not actively engaged, in the pursuit of autonomous decision-making outside of the formal justice system. A key aspect of this is simplification. Although research is yet to clarify the substance of ‘outsider’ settlements, for present purposes, an examination of existing empirical data and academic commentary suggests that for the outsider, family law is becoming a more simplified version of its official form. A dominant discourse is that ex-partners should be able to self-manage their own relationship breakdown. With the focus on ‘problem-solving’ rather than resolving legal disputes, the discourse has subtly shifted, moving the emphasis away from legal provisions to an ‘anyone can problem solve’ mantra.

As the Law Commission says, ‘(b)argaining “in the shadow of the law”, seeking to produce the sort of outcome that the courts would have ordered, is very difficult if the

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<sup>90</sup> See *Wyatt v Vince* [2015] UKSC 14.

<sup>91</sup> ‘(T)here is a range of other cases which can very often result from a litigant’s own decisions in their personal life. ... Where the issue is one which arises from the litigant’s own personal choices, we are less likely to consider that these cases concern issues of the highest importance’: Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7967 (MoJ, 2010), para 4.19.

law is not known and not accessible.<sup>92</sup> DIYers are unable to bargain in the shadow of the law as the legal principles themselves may not be known to them given the lack of access to legal advice through legal aid, and the inherently discretionary exercise under s 25 MCA 1973 and the private law provisions of the Children Act 1989. What evidence there is, from the recent research on court and ADR studies, suggests that some individuals struggle without some professional advice to at least signpost them in the right direction,<sup>93</sup> leaving ‘outsiders’ vulnerable and willing to listen to any form of apparently semi-authoritative guidance.<sup>94</sup>

‘On being approached with a self-negotiated agreement, the solicitor realised that the wife had not considered the husband’s “fantastic” pension and, crucially, had not realised that she could make a claim on it. This omission was mentioned to the wife who then wanted to renegotiate the agreement in order to claim some of the pension. The husband, in response, was reported to be prevaricating and “holding her to ransom with numerous things, including the house sale.”’  
(Solicitor interviewee)<sup>95</sup>

Claims from one party about ‘owning’ a particular family asset, such as a work-place pension scheme,<sup>96</sup> and corresponding lack of knowledge of how assets are classified upon divorce or separation, demonstrate how outsider justice can be based on notions of justice far removed from the substantive law. When discussing settlement, DIYers may confuse law with ‘social or moral notions of justice’,<sup>97</sup> in the same way that research has identified in relation to LiPs.<sup>98</sup> However, this is not unique to LiPs and those without legal guidance. Previous research has identified that morality and emotion are a feature in solicitor negotiation and settlement.<sup>99</sup> In the delegatised

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<sup>92</sup> Law Commission, *Matrimonial Property, Needs and Agreements*, Law Com No 343 (TSO, 2014), para 1.23.

<sup>93</sup> See, for example, L Trinder et al, *Litigants in person in private family law cases* (MoJ, 2014) and E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013).

<sup>94</sup> For example, individuals ‘crowdsourcing’ support and advice through the use of online forums such as Families Need Fathers and Mumsnet. See L Smith, ‘Chasing Shadows: online information and advice on family law disputes’, paper presented at Leverhulme International Network Conference on New Families; New Governance, London: University of Notre Dame London Campus, September 2014, [http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/law/familyregulationandsociety/Speakers\\_Briefing\\_papers\\_all\\_sessions.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/law/familyregulationandsociety/Speakers_Briefing_papers_all_sessions.pdf) p 84.

<sup>95</sup> E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), p 131.

<sup>96</sup> H Woodward with M Sefton, *Pensions on Divorce: An empirical study* (Cardiff Law School, 2014), p 106 and p 139. Furthermore, Woodward and Sefton highlighted that the involvement of practitioners was a key element as to whether financial remedy outcomes included a pension order (p 119 and 134).

<sup>97</sup> R Moorhead and M Sefton, *Unrepresented litigants in person in first instance proceedings* (DCA, 2005), 256.

<sup>98</sup> Ibid.

<sup>99</sup> See, for example E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013).

space, however, outsider justice may well lean towards a more moral notion of justice, exacerbating an individual's tendencies to associate justice with morality and therefore what law 'should' or 'ought' to require. This moral notion of justice could be based on an ex-spouse's adultery or general hurt over a relationship breakdown and the other party's 'unreasonable behaviour' which 'may impede the (DIYer's) emotional readiness to settle and colour their view of what outcome is substantively fair'.<sup>100</sup> This may leave 'outsider' ex-partners vulnerable to settlement based on a particular version of justice rather than legal principle.

Simplification may also be generated through the attractiveness of legal myths. We know from research on cohabitants, that legal myths overshadow cohabitants' disputes<sup>101</sup> and that the myth of the common law marriage prevails for large sectors of this population.<sup>102</sup> However, the Law Commission also highlighted that myths can and do permeate the divorcing population who lack access to any official routes to or forms of justice.

'Accordingly, a couple seeking to negotiate a financial settlement on divorce, without the means to afford lawyers and without the inclination to go through the court process, may have great difficulty in discerning what their legal rights and responsibilities are. They may be under the impression that the law requires them to share everything on a 50:50 basis. They may be under the impression that the wife is entitled to lifelong support, or to no support – and that confusion may be exacerbated by ... the fact that there appears to be significant differences in the levels of support awarded by courts in different parts of the country.'<sup>103</sup>

In tandem with an increasingly limited influence of legal principle and the complexity of financial remedy law which makes it hard to convey to lay people,<sup>104</sup> legal marriage myths have the potential to exert a similar influence on divorcing outsiders. This is particularly problematic for those outsiders who are 'digitally excluded',<sup>105</sup> given increasing reliance on digitisation and online support mechanisms.<sup>106</sup> Since less than one-third of the population is considered to have the necessary skill-set to access digital services unaided, legal marriage myths, such as 'equality of asset division'

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<sup>100</sup> Ibid, p 117.

<sup>101</sup> See A Barlow, C Burgoyne, E Clery and J Smithson, 'Cohabitation and the Law: Myths, Money and the Media' in A Park, J Curtice, K Thomson, M Phillips and E Clery (eds), *British Social Attitudes: The 24<sup>th</sup> Report* (Sage, 2008) and G Douglas, J Pearce and H Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Cardiff and Bristol Universities, 2007).

<sup>102</sup> See A Barlow et al (2008), *ibid* and R Probert, 'The Evolution of the Common Law Marriage Myth' [2011] Fam Law 283.

<sup>103</sup> Law Commission, *Matrimonial Property, Needs and Agreements*, Law Com No 343 (TSO, 2014), at para 2.55.

<sup>104</sup> See Advicenow, *A survival guide to sorting out your finances when you get divorced* (Advicenow, 2017) available at <http://www.advicenow.org.uk/advicenow-guides>.

<sup>105</sup> Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, Cm 9321 (2016), para 7.1.3.

<sup>106</sup> Lord Chancellor, Lord Chief Justice and the Senior President of Tribunals, *Transforming Our Justice System*, (MoJ, 2016) p 6 and 13.

upon relationship breakdown and ‘shared parenting as equal time’ may increasingly influence the outsider justice discourse.<sup>107</sup> In the research report *Settling Up*, one of the responses which featured heavily among interviewees when identifying principles which shaped financial arrangements upon relationship breakdown when dividing assets was equality of division. While fault was also identified in people’s assessment of fairness, the authors noted that although ‘some of these factors reflect the legal situation and others do not, it was notable that people’s views did not appear to be based strongly in any knowledge or understanding of legal entitlement. Rather they were underpinned by pragmatism, emotional preferences, financial constraints, and personal values.’<sup>108</sup> For individuals experiencing outsider justice, guiding legal principles such as fairness and equality may become simplified to the detriment of those who would have benefitted from a more nuanced discourse. This could leave many families vulnerable to settlements based on erroneous or simplified legal myths inappropriate in that particular case.

Given the restricted capacity for doctrinal law to permeate the discourse within this space for both married and unmarried couples and given the focus on autonomous settlement outside of the court, what role, if any, does law have? From the preceding discussion, it is suggested that it is unclear whether outsider justice is pragmatic and/or prescribed by legal myths. In an era where the norms and values being promoted are privatisation, private ordering, self-regulation and autonomy, any conception of justice has as its backdrop the fundamental policy concern of keeping private disputes outside of the courts with limited availability of procedural ‘routes’ to justice. Where law and legal principle do appear, they appear limited in the following respects: the role of law is being downplayed and therefore decreasing in relevance for outsider family disputes; legal principle is simplified into ‘soundbites’ or ‘easy principles’ such as 50/50 asset division, and legal myths are potentially informing outsider justice. While the legal status of marriage or indeed, parenthood can create entitlement and responsibility, the new norms of settlement, autonomy and private ordering potentially eliminate those legal consequences due to the type of justice that is being experienced in the outsider space. Indeed, without support to obtain that entitlement and responsibility, one might ask whether government has indirectly

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<sup>107</sup> When discussing property and superannuation reform in Australia, John Dewar suggested that equality is attractive because it ‘serves a number of purposes simultaneously: it promotes efficiency by increasing the certainty of the law; it promotes justice because it provides the law with a coherent principle that is readily understood by ordinary people; and it brings law into line with the social ‘fact’ that men and women are economically more equal.’ He went on to examine the basis for these arguments and concluded that the evidence used is speculative and selective and yet despite this, the principle of equality maintains its appeal. J Dewar, ‘Making Family Law New? Property and Superannuation Reform in Australia’ in M Maclean (ed), *Making Law for Families* (Hart, 2000), pp 59-61.

<sup>108</sup> J Arthur et al, *Settling Up: making financial arrangements after divorce or separation* (National Centre for Social Research, 2002), p 72. For further discussion of individuals’ rationales when making family decisions, see A Barlow and S Duncan, ‘New Labour’s Communitarianism, supporting families and the “rationality mistake”: Part 1’ (2000) 22(1) JSWFL 23 and H Reece, ‘Leaping without Looking’ in R Lecky, *After Equality: Family Sex, Kinship (Social Justice)* (Routledge, 2014).

managed to trivialise one of the key consequences of marriage: the ability to obtain financial remedies upon divorce.

## Concluding thoughts

By examining justice through a settlement lens, it has been argued that settlement regulated by the law and formalised through official routes is distinct from settlement informally delivered by the parties in terms of the way justice is shaped and conceived. The previous discussion has highlighted the key requirements and elements of each conception within the new family justice paradigm. The table below provides an overview of these key aspects:

### The new Family Justice paradigm: an overview of Official, Operative and Outsider Justice

Conception of justice	Type of justice / Role of law and procedure	Where does justice occur? (place of dispute)	What is involved in promoting justice? (method(s) used during dispute)	Who is receiving and implementing justice? (participants involved in the dispute)
Official	Formal justice using legal principles which are prescribed and recognised	Court  Solicitors' offices  Child Maintenance Service	Adjudication and court hearings  Consent Orders  Arbitration  Collaborative law  Solicitor negotiation	<u>Receiving justice</u> Those who can afford representation, the collaborative or arbitration processes, or court fees. Those entitled to legal aid LiPs CMS applicants  <u>Implementing justice</u> Judiciary Arbitrators CMS administrative support Solicitors
Operative	Functional justice – a practical and pragmatic approach to achieving justice with some use of principle	Regulated Service Providers providing ADR services eg Mediation  Unregulated service providers eg Fee-charging McKenzie Friends	ADR such as mediation  Online statutory guidance (child support)	<u>Receiving justice</u> Those who get Legal Aid for mediation or are able to pay for regulated or unregulated providers  Digitally enabled population able to use the online child support calculator  <u>Implementing justice</u> ADR professionals such as mediators



				Unregulated service providers Parties themselves
Outsider	Beyond formal and functional justice – unclear whether justice is non-existent, pragmatic, prescribed or bound by legal myths	Delegalised space	Online and offline support  A need for research on what DIYers are doing within the delegalised space	<u>Receiving and implementing justice</u> The parties to the dispute. This is the majority of the separating population, but further breakdown is difficult due to lack of research on this population. This will include individuals who have chosen to remain outsiders as well as the vulnerable who did not qualify for legal aid and/or mediation was unsuitable/unsuccessful

Despite the general downplaying and simplification of the law within each justice space, the official justice process is still predicated on a full representation model,<sup>109</sup> with the complexities of the forms and process having been identified as potentially confusing and complex for those new to, and unsure of the system.<sup>110</sup> In one respect, this highlights how law and legal process is still at the heart of the family justice system but lessens as individuals settle their family disputes further away from the ‘system’s anchor’ – the courts and the judiciary. It also serves to highlight two issues. First, that while the legal norms used within family law may appear ‘straightforward’, legal concepts such as ‘fairness’ belie a great deal of legal complexity. Secondly, if courts and the judiciary remain at the core of the system, then in one sense justice without them may be impossible. However, a mass system needs to be able to function without the degree of individual attention judge-applied law requires.

Official justice is negotiated and formalised in the direct shadow of the law but this shadow becomes much less defined and intense as we move into the operative justice space. For the vast majority of outsider private family disputes, the law may no longer have any direct relevance and instead, trends towards simplification have been identified. Government policy documents have focused on individuals’ ability to make their own agreements in child arrangements, finances and child support, and with the removal of legal aid, individuals experiencing a family dispute are required to access the courts by themselves unless they can afford legal representation or obtain or employ lay support. In all of these respects, legal expertise is no longer fundamental to a family dispute: ‘(I)t is not the case that everyone is entitled to legal

<sup>109</sup> See L Trinder et al, *Litigants in person in private family law cases* (MoJ, 2014), p 35.

<sup>110</sup> See L Trinder et al, *ibid* and E Hitchings et al, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce* (Bristol University, 2013), ch 5 for issues raised in relation to the procedural difficulties that LiPs may encounter.

representation, funded by the taxpayer, for any dispute or to a particular outcome in litigation.’<sup>111</sup>

The problem with approaches to private family law which do not reflect or take into account the substantive law during the negotiation or bargaining stages, is that agreements may not necessarily reflect legal entitlements and that law and correspondingly, the role of lawyers within the process, is downplayed. For example, within the operative space, mediators have been the focus of government policy for many years and the recent consultation about mediators drafting consent orders raises a raft of issues concerning the role of lawyers within the process. If mediators are permitted by their Code of Practice to draft consent orders, a key role for lawyers within the existing family justice system will be opened up to other service providers. As a consequence, there will be no commitment to legal benchmarking at the end of mediation by requiring a solicitor to draft the consent order application and therefore to advise the parties on the merits or not of the settlement reached. While settlement and agreement between parties going through a private family dispute should certainly be encouraged, that should not be to the detriment of the law, legal principle and legal norms. Settlement should be achieved in the shadow of the law, not regardless of it. The law is there to protect vulnerable individuals and uphold rights and responsibilities. Within each family justice space, participants are increasingly reliant on themselves, their own (in)ability to settle their family dispute, and to a greater or lesser extent depending on the justice space being engaged, their own (mis)understanding of family law - to the extent that it can be said that the recent trend in family justice is to make lawyers of us all.

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<sup>111</sup> Ministry of Justice, *Reform of legal aid in England and Wales: The Government response*, Cm 8072 (2011), para 140.